UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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COSIMO PANETTA and MIRELLA PANETTA,

Plaintiffs,

- against -

THE VILLAGE OF MAMARONECK, JOHN WINTER in his capacity of Building Official of the Village of Mamaroneck, RICHARD SLINGERLAND in his capacity as Village Manager of the Village of Mamaroneck, CHRISTIE DERRICO in her capacity as Village Attorney of the Village of Mamaroneck, JANET INSARDI in her capacity as former Village Attorney of the Village of Mamaroneck, STUART TIEKERT and CHARLES MORELLI,

Defendants.

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Index No.: 11 CV 4027 (VB)
ECF CASE

COMPLAINT

Plaintiffs Cosimo Panetta and Mirella Panetta (hereinafter "Plaintiff") by their undersigned attorney, Joseph C. Messina, Esq. for their complaint against the above named defendants allege as follows:

Introduction

1. Plaintiff is the owner of real property located in the Village of Mamaroneck with a tax lot designation of Section 4, Block 54, Lot 22, also commonly known as 514 Pine Street, Mamaroneck, New York (hereinafter the "Premises").

2. Plaintiff brings this action for relief under 42 U.S.C. §1983, 42 U.S.C. §1988, and the All Writs Act §28 U.S.C. 1651 as Defendants have violated Plaintiff's civil rights having unlawfully denied the issuance of a permanent Certificate of Occupancy ("C of O") for the Premises in spite of the fact that the Premises in all respects complies with all applicable local and State codes and requirements, and the

construction of all off-site improvements were completed in compliance with the Resolution of the Planning Board of the Village of Mamaroneck (hereinafter "Planning Board") passed on November 29, 2001 and thus Pine Street was suitably improved in compliance with State of New York Village Law §7-736 (hereinafter "Village Law").[1]

3. Plaintiff seeks declaratory and compensatory relief for injuries as a result of Defendants' unlawful and arbitrary action in withholding issuance of the C of O for the Premises after the above noted Planning Board action. In particular, Plaintiff seeks, among other things, a judgment ordering the immediate unconditional issuance of the C of O for the Premises.

4. The exact nature of the declaratory relief sought hereunder will be set forth hereinafter.

Parties

5. Plaintiff Cosimo Panetta is a natural person residing at the Premises.

6. Plaintiff Mirella Panetta is a natural person residing at the Premises.

7. The Defendant Village of Mamaroneck (hereinafter "Village") is, upon information and belief, a municipal corporation existing under the laws of the State of New York.

8. Defendant John Winter (hereinafter "Winter") is the duly appointed Building Official of the Village. He is sued herein both in his capacity as an official of the Village and also individually.[2]

[1] Plaintiff also posted a performance bond to assure required off-site improvements were completed.

[2] As of July 31, 2011, the resignation of Winter as the duly appointed Building Official of the Village will become effective.

9. Defendant Richard Slingerland (hereinafter "Slingerland") is the duly appointed Village Manager of the Village of Mamaroneck. He is sued herein both in his capacity as an official of the Village and also individually.

10. Defendant Christie Derrico (hereinafter "Derrico") is the former duly appointed Village Attorney of the Village of Mamaroneck.

11. Defendant Janet Insardi (hereinafter "Insardi") is the former duly appointed Village Attorney of the Village of Mamaroneck. She is sued herein both in her capacity as an official of the Village and also individually.

12. Defendant Charles Morelli (hereinafter "Morelli") is a natural person residing at 130 Beach Avenue, Mamaroneck, New York.

13. Defendant Stuart Tiekert (hereinafter "Tiekert") is a natural person residing at 130 Beach Avenue, Mamaroneck, New York.

Jurisdiction and Venue

14. This action was commenced by the filing of a Summons with Notice with the Westchester County Clerk's Office on June 2, 2011, Supreme Court of the State of New York, Westchester County, bearing Index No. 12060-2011.

15. Subsequent to the service of process, on June 14, 2011 the matter was thereafter removed to this Court pursuant to 28 U.S.C. 1441 by counsel to Defendants The Village of Mamaroneck, John Winter in his capacity as Building Administrator of the Village of Mamaroneck, and individually, Richard Slingerland in his capacity as Village Manager of the Village of Mamaroneck, and individually, Christie Derrico in her capacity as former Village Attorney of the Village of Mamaroneck, Janet Insardi in her capacity as former Village Attorney of the Village of Mamaroneck, and individually.

16. The subject matter jurisdiction of this Court is founded upon 28 U.S.C. §1331 (federal question jurisdiction) in that this action is brought under 42 U.S.C. §1983.

17. The Court also has supplemental jurisdiction of State claims under 28 U.S.C. §1367.

18. Venue is proper in this Court pursuant to 28 U.S.C. 1391(b) in that all of the events giving rise to the claims herein occurred in this district and Defendants are subject to personal jurisdiction in this district as of the commencement of this action.

The Nature of the Claims Herein and the Relief Requested

19. (i) **Claims for Damages Under 42 U.S.C. §1983**

(A) The actions of Defendant Village constitute a violation of substantive due process against Plaintiff;

(B) That the Defendants Tiekert and Morelli have conspired with officials of the Village to deprive Plaintiff of their constitutional rights in violation of 42 U.S.C. §1983;

(C) The actions of Defendant Village constitutes a violation of Plaintiff's First Amendment Rights;

(D) That the individually named Defendants are liable for punitive damages to Plaintiff;

(E) That Plaintiff is entitled to an award of attorneys fees under 42 U.S.C. §1988.

(ii) **Claims for Damages Under New York State Law**

(A) The actions of the Defendants constitute a prima facie tort against Plaintiff.

(iii) **Declarations Pursuant to CPLR 3002**

(A) A declaration that pursuant to the provisions of the Mamaroneck Village Code (hereinafter "Code") it is the sole responsibility of the Building Official to issue certificates of occupancy;

(B) A declaration that based upon the respective State statutes and provisions of the Code, where plaintiff has, as here, satisfied all requirements of State and municipal building codes in the construction of the premises, a certificate of occupancy must be issued.[3]

(C) A declaration that all off-site improvements required of Plaintiff by the Planning Board Resolution of November 29, 2001 have been completed in accordance therewith and Plaintiff is entitled to the issuance of the C of O.

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[3] Likewise, in §1983 cases, where it is alleged, as here, that the construction for which the certificates of occupancy are sought, satisfies all the requirements of State and municipal law requirements, there was no element of discretion or judgment remaining for the building official to exercise in determining whether to issue the certificates, thus a cognizable property right for the §1983 is established. See Sullivan v. Town of Salem, 805 F.2d 84-85 (2nd Cir. 1986); Village Pond v. Town of Darien, 56 F.3d 375 @ 379 (2nd Cir. 1995); Brady v. Town of Colchester, 863 F.2d 205 (2nd Cir. 1988); The Cathedral Church of the Intercessor v. The Incorporated Village of Malverne, 2006 WL 572 855 (E.D.N.Y. 2006); O'Mara v. Town of Wappinger, 400 F.Supp.2d 634 (S.D.N.Y. 2005) revs'd on other grounds 485 F.3d 693, 700 (2nd Cir. 2007); United Talmudical Academy Torah v. Town of Bethel, 24 Misc.3d 1240(A) (Supreme Sullivan, 2009); Brower Associates v. Town of Pleasant Valley, 2 N.Y.3d 617 @ 629 (2004), citing Sullivan, *supra*, for the proposition that if homes fully conformed to building requirements, builder was entitled to certificate of occupancy thus a cognizable property being established .

Further, since the Resolution of the Planning Board of November 29, 2001 required Plaintiff to file a performance bond to guarantee the completion of off-site improvements, issuance of the permanent certificate of occupancy could not be denied even if off-site improvements were unfinished.

(D) A declaration that once the Planning Board required the posting of a performance bond by Plaintiff in its resolution of November 29, 2001, Defendant Village could not withhold issuance of the subject certificate of occupancy.

Necessary Allegations as to the 42 U.S.C. §1983 Claim

20. As to certain claims at law herein, a portion of this action is brought pursuant to the provision of 42 U.S.C. §1983 (hereinafter §1983) and 42 U.S.C. §1988.

§1983 provides:

> "Every person who, under color of any statute, ordinance, regulation, custom or usage, of any State . . . subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. . ."

21. Pursuant to §1983, a person may seek monetary damages and declaratory or injunctive relief against anyone who, acting under color of state law, subjects such person to the deprivation of any rights, privileges, or immunities protected by the Constitution or laws of the respective states.

22. There are two essential elements in §1983 claims: (1) the conduct complained of was carried out under color of state law; and (2) this conduct deprived the plaintiff of rights, privileges or immunities secured by the Constitution or laws of the United States.

23. As will hereinafter be shown, it is alleged herein that improper, illegal and unauthorized actions on the part of various municipal officials of the Village and certain private individuals, to wit, Defendants Tiekert and Morelli have denied Plaintiff of certain constitutional rights in violation of 42 U.S.C. §1983.

24. To be actionable under §1983, municipal action which causes the violation must be made by the decision maker who possesses final authority to establish municipal policy with respect to the action involved, in this case Building Official Winter, who has continued to, wrongfully and illegally, refuse to issue the C of O for the Premises.

25. An act undertaken by a municipal official is an act of the municipality.

26. Such determination as to final decision making authority is made by the court as a matter of law, and is not a triable issue of fact.

27. In the land use context, the improper withholding of a certificate of occupancy is violative of a landowner's constitutional rights and actionable under §1983.[4]

28. Defendants Winter, Slingerland, Insardi, Teikert and Morelli are named individually in the Complaint as having personal involvement in the alleged constitutional deprivations, in that their actions are alleged to have been motivated by malice or callous indifference to Plaintiff's rights, rendering them liable for punitive damages.

29. Despite the fact that Winter, the Village Building Official, is the final decision maker for the issuance of the certificate of occupancy, Slingerland, as Village Manager, and Insardi, as Village Attorney, are likewise individually liable for the constitutional violations caused by Winter where, as supervisors, they (i) participated directly in the alleged violation by the employee, failed to "remedy the wrong" after being informed of the employee's violation through a report or appeal, (ii) created an

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[4] To act "under color" of State law for §1983 purposes does not require that a defendant be an officer of the State. It is enough that he is a willful participant in joint action with the State or its agents. Private persons, jointly engaged in the challenged actions are acting "under color" of law for purposes of §1983 action. SEE Arar v. Askcroft, 585 F.3d 559 @ 628 (2nd Cir. 2009).

It is alleged herein that Defendants Stuart Tiekert and Charles Morelli have jointly engaged with state officials in the challenged action and are subject to suit under §1983.

official policy or custom under which the employee's unconstitutional conduct occurred, (iii) were grossly negligent in supervising subordinates who committed the wrongful acts, or (iv) were deliberately indifferent to information that the unconstitutional acts were occurring. Colon v. Coughlin, 58 F.3d 865, 873 (2d Cir. 1995).

30. Such allegations are likewise sufficient to state a §1983 conspiracy theory.

STATEMENTS OF FACTS

31. The history of this matter is comprised of three (3) chronological periods. In explaining how that history ultimately led to the institution of this proceeding, and to make it more easily understandable for the Court, each of these chronological periods, which have distinct legal impact on the matter, will be examined. They are identified as follows:

(A) The period leading up to the Planning Board approval; issuance of the building permit for the Premises; commencement of the required work under the Planning Board Resolution of November 29, 2001. **(Period 1)**;

(B) Completion of the required work under Planning Board Resolution of November 29, 2001 and the Post Permit Period; the Tiekert (a named Defendant herein)/Furey (Village Engineer) controversy **(Period 2)**;

(C) The period of improper Village intervention[5] **(Period 3)**.

Period 1

32. By resolution of the Planning Board of the Village of Mamaroneck (hereinafter "Planning Board") dated January 28, 1994, Pine Street was expressly

[5] The actionable period for 42 U.S.C. §1983 purposes commenced in August of 2009, when officials of the Village threatened to revoke the Temporary Certificate of Occupancy for the Premises (hereinafter "TCO") which was issued on December 16, 2002.

approved in accordance with the requirements of Village Law of the State of New York §7-736 (hereinafter "Village Law §7-736), as having "safe and adequate access."[6]

33. In or about 1997, a preliminary proposal for the development of two (2) lots on Pine Street was submitted to the Village by the prior owner James Bilotta.

34. Preliminary approval was given to the project in 1997 by the Village, the Westchester Joint Water Works and Westchester County Department of Health.

35. The two (2) lots in question, i.e. 514 and 520 Pine Street, front that street, which runs parallel to Walnut Street, its adjacent neighbor thoroughfare.

36. Pine Street was a public street and as such it was recognized by the Village that the best method for improving the drainage system for the project would be to secure easements from the adjoining neighbors to the rear on Walnut Street to tie into the existing public drainage on that street.

37. This particular solution to the drainage issue for the project was the most desirable since excavating Pine Street to make the connection to the Walnut Street tie would have been difficult and costly to the Village because of the reverse pitch of Pine Street and the need to make a 90° turn north on Beach Avenue to reach the Walnut Street tie.

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[6] Village Law §7-736(2) provides, in pertinent part, that:

> "No permit for the erection of any building shall be issued unless a street or highway giving access to such proposed structure has been duly placed on the official map or plan. Before such permit shall be issued such street or highway shall have been suitably improved to the satisfaction of the planning board in accordance with standards and specifications approved by the appropriate village officers as adequate in respect to the public health, safety and general welfare of the special circumstances of the particular street or highway, or alternatively, and in the discretion of such board, a performance bond sufficient to cover the full cost of such improvement as estimated by such board or other appropriate village departments designated by such board shall be furnished to the village by the owner." (my emphasis)

38. Although Pine Street and Walnut Street were at the time both accepted Village Streets for the purposes of Village Law § 7-736, the Village sought to shift the burden of securing the easements across the adjoining Walnut Street properties to the developer of the two (2) lots rather than appropriately securing same by eminent domain as part of a public improvement for a drainage tie-in.[7]

39. In August of 2000, the (then) Village Engineer Dolph Rotfeld ("Rotfeld"), was informed by an engineer representing the property owner that the attempts to secure drainage easements from the adjoining neighbors on Walnut Street to install a hard pipe system onto Walnut Street were unsuccessful and that an alternative drainage plan was necessary if the lots in question were to be developed.

40. In October of 2000, a revised drainage plan was submitted to Rotfeld.

41. By memo dated December 28, 2000, Rotfeld advised then Village Manager Michael Blau ("Blau") that certain minor changes were necessary in the revised drainage plan before same could be recommended to the Village.

42. By memo dated January 12, 2001 from Blau to then Building Official Ernest Poccia (referring to a memo from Rotfeld to Blau dated January 10, 2001) it was stated that "the drainage plan for the property is now acceptable to the Consulting Engineer" and thus, when Building Department requirements "have been met, feel free to issue a Building Permit."

43. On or about July 2, 2001, Plaintiff purchased the two Pine Street lots from Bilotta.

[7] Upon information and belief there is now before the Planning Board an application under Village Law §7-736 for the construction of another single family dwelling on an unimproved lot on Pine Street wherein it will be required that a hard pipe drainage system be installed.

44. Pursuant to the directive set forth in paragraph 42 above, the Village issued to Plaintiff a street opening permit No. 11001785 dated July 11, 2001 to allow installation of the requisite utilities to develop the subject lots.

45. Sometime in early August of 2001, some eight (8) months after the previously mentioned Rotfeld memo and barely a month after the issuance of the street opening permit, Plaintiff was informed that the street opening permit above mentioned was to be revoked and that application should be made to the Planning Board for "dedication" of Pine Street.

46. That application was filed by Plaintiff on August 28, 2001.[8]

Activity Before Planning Board Action

47. After said application was filed, by memo dated September 6, 2001, Blau informed then Planning Board Chairperson Doris Erdman (hereinafter "Erdman") that one "Stuart Tiekert, as a representative of neighboring property owners, was voicing concerns regarding the Pine Street application" and had made a FOIL request for all the Village's "information" regarding the project.

48. Despite the prior acceptance of Pine Street by the Village in January of 1994 with the imprimaturs that, pursuant to Village Law 7-736, the street had "safe and adequate access," by memo dated September 12, 2001, Rotfeld informed Erdman that Blau had been "advised" that the street did not meet acceptable Village standards and that it had been "recommended that the site drainage should be piped to the storm drain on Walnut Street."

[8] Although the application involved both undeveloped lots on Pine Street (514 and 520 Pine Street), a permanent C of O was issued for 520 Pine Street on May 9, 2003 and therefore only 514 Pine Street is the subject of this matter.

49. That memo further states that "easements" through the adjacent property for the drain line could not be secured, thus alternate "design for the subsurface leeching pits . . . was found to be acceptable" by Rotfeld.

50. Echoing that position was an October 16, 2001 memo from Rotfeld directly to Erdman, which stated the best solution relative to drainage "was to connect to the Village system on Walnut," however, since the private property owners would not grant an easement, the drainage plan developed by Plaintiff's engineer "for on site retention was accepted after review by this office."

51. Shortly thereafter Frank Fish (hereinafter "Fish") of Buckhurst, Fish & Jacquemart, Inc., Planning Consultants for the Village of Mamaroneck (hereinafter "BFJ") entered the picture and by memo dated October 25, 2001 to the Planning Board he reports that after his conversations with then Village Attorney Steve Silverberg (hereinafter "Silverberg") and Rotfeld, there were two issues of environmental impact (1) drainage and (2) preservation of an existing tree.

52. That memo further advised the Planning Board that before they issue a negative declaration under SEQRA, both of those issues should be "satisfactorily resolved."

53. In a November 27, 2001 memo from Rotfeld to Erdman and the Planning Board, he noted that "as per my previous memos . . . the proposed stormwater plan is acceptable."

54. In a subsequent November 29, 2001 memo to the Planning Board, Mr. Fish advised the Board that Rotfeld had "indicated to me that he had signed a set of drawings and that this constituted his approval of the drainage plan for this project."

55. Thereafter, based upon all of the foregoing information provided to the Planning Board, on November 29, 2001 that body adopted a resolution which in pertinent part stated:

* * *

6. At the request of the Planning Board, Applicant conducted additional test pits on 11/8/01 which were observed by Village Consulting Engineer, Dolph Rotfeld, Applicant's engineer and representatives of the neighbors and a report has been provided to the Planning Board by Dolph Rotfeld.

7. The plans have been reviewed by the Village's Consulting Engineer, Dolph Rotfeld, and he has found them to be adequate in design and in their provision for drainage. We note that drainage is a significant issue which was raised by the neighbors and that **the plan submitted by the applicant provides for drainage, which plan the Village consulting engineer has found to be adequate.** (emphasis added)

* * *

11. Under the circumstances, this Board finds that the proposal by the applicant fully complies with the requirements of § 7-736 of the Village Law of the State of New York and **more particularly that Pine Street shall be suitably improved as proposed** and such improvement shall be adequate with respect to public health, safety and general welfare for the special circumstances of this particular street, the existing 6 homes and the proposal to develop the two lots by the applicant. (emphasis added)

* * *

"E. **That prior to the commencement of any work on Pine Street a Bond shall be filed** with the Clerk Treasurer of the Village of Mamaroneck in an amount to be fixed by the Village's Consulting Engineer **to cover the full cost of all improvements on Pine Street** and any remedial work on the tree at issue resulting from applicant's activities and such Bond shall be held for a period of one year subsequent to the completion of all work to insure the quality of the work and to remedy any deficiencies in the work which may occur during that one year period." (emphasis added)

"IT IS THEEFORE RESOLVED that the application is granted with the finding that the applicant has complied with the requirements of § 7-736 of the Village Law of the State of New York upon the following conditions:

A. That the development shall take place in accordance with the Plans and Specifications submitted to this Board and more particularly the Plans prepared by the applicant's engineer dated January 25, 1997 and most recently revised on January 6, 2001:"

56. By correspondence dated December 20, 2001, Plaintiff was notified by Village General Foreman of Public Works, Tony Iacovelli, that, as authorized by Fish and then acting Village Manager Lenny Verrastro (hereinafter "Verrastro") the street opening permit for Pine Street had been reissued and work was permitted to resume.

57. In compliance with subsection E of the above cited Resolution, Plaintiff filed the appropriate performance bond.

Post Resolution Activity

58. Subsequent to the Planning Board approval, the surrounding neighbors began to question the progress of the work, in particular the approval of the drainage plans.

59. Sensing that this neighborhood sentiment would affect the progress of the project via administrative procrastination, on January 18, 2002 Plaintiff's then attorney David I. Grauer wrote to then Village Attorney Steve Silverberg expressing concern that "in regard to the drainage plan which was previously approved by the Village Engineer, it seems that the neighbors are continuing to lobby in an effort to persuade the Village Engineer to impose new requirements. . ."

60. Revised site plan drawings were submitted to Rotfeld by Benedict Salanitro, PE (hereinafter "Salanitro"), Plaintiff's engineer, on or about January 21, 2002, and by memo dated January 25, 2002 by Anthony Oliveri of the office of the Village Engineer, it was recommended "that construction of underground utilities (water, sewer,

storm, gas, etc.) continue but road paving . . . be suspended . . ." until certain issues were resolved.

61. By letter dated January 29, 2002, Planning Chairperson Erdman advised attorney Grauer that ". . . conditions encountered have necessitated changes in the approved plan for Pine Street . . ." and that the matter was further placed on the Board's agenda for February 28, 2002 so the Board could ". . . determine what modifications will have to be made . . ."

62. By memo dated February 21, 2002 from Rotfeld to Poccia, the Building Department was informed that Plaintiff had been directed to make certain specified changes to the plans for Pine Street.

63. Thereafter in a memo dated February 28, 2002 from Rotfeld to Chairperson Erdman, the Planning Board was advised that based upon inspections conducted, Plaintiff had complied with the "requirements listed in our February 21st memo."

Issuance of the Building Permit

64. Thereafter, on or about March 5, 2002, in compliance with the provisions of Village Law §7-736, the Village Building Department issued Plaintiff a building permit for the construction of the single family dwelling known as 514 Pine Street which permit was based and conditioned ". . . all correspondences and approvals by the Planning Board and the Village Consultant Engineer," memo dated March 4, 2002.

65. In April of 2002, shortly after the issuance of the above building permit, the Village Engineer, Dolph Rotfeld Engineering PC, resigned as consultant and was

replaced by KW Furey Engineering (hereinafter "Furey"), which firm then assumed continued oversight of the project on behalf of the Village.

Period 2 - Completion of the Required Work and Post Permit Controversy

66. As the work on the project progressed, during the fall of 2002, a series of dialogues commenced between Furey and Tiekert, which "revisited" the issue of compliance with the Planning Board's resolution.

67. This "dialogue" would continue.

68. By letter correspondence dated December 30, 2002, at Tiekert's prompting, then acting Village Manager Robert Yamuder, Plaintiff was advised that there were certain issues which needed to be addressed, ". . . prior to the Village of Mamaroneck's issuance of the final 'Certificate of Occupancy' for each of the subject properties," i.e. 514 Pine Street and 520 Pine Street.

69. Amongst the listed "issues" in the above cited correspondence included payment of the consulting fees of the Village Engineer.

70. As to the "consultant fee issue," Plaintiff's then attorney David Grauer had previously by correspondence addressed to Village Manager Sanford Miller dated October 4, 2002, questioned the imposition of Rotfeld's "consulting fees" on Plaintiff, asserting that ". . . efforts to obtain a routine determination for the Planning Board was substantially frustrated as a result of numerous issues that were raised by abutting neighbors to the subject property . . ." and in particular, ". . . were a direct outgrowth of demands and issues that flowed from Mr. Tiekert . . ."

71. By letter dated December 31, 2002 Acting Building Inspector of the Village Robert Yamuder to Mr. Tiekert advised him that ". . . the Building Department

will not issue a final 'Certificate of Occupancy' for the properties being developed at 514 and 520 Pine Street without the review and approval of 'as-built' drawings."

72. This Village position was echoed in a January 10, 2003 correspondence from Village Manager Miller to Mr. Tiekert.

73. Thereafter, by letter dated February 26, 2003 Mr. Tiekert once again wrote to Village Manager Miller about the "flaws in the drainage system."

74. Contrary to this assertion made by Mr. Tiekert, Plaintiff's engineer Salanitro wrote to Yamuder on March 31, 2003 stating that the drainage system in all respects conformed to the plans and specifications approved by the Planning Board.

The Tiekert/Furey Fued

75. Documents which have been provided by the Village to Plaintiff in FOIL requests clearly reflect, that an obvious contentious relationship between Mr. Tiekert and various Village officials (both past and present) and in particular Mr. Furey developed.

76. From a review thereof it is perfectly clear, according to Mr. Furey, that all work performed by Plaintiff on Pine Street was in compliance with the resolution of the Planning Board dated November 29, 2001 and in accordance with the Plans and Specifications submitted to the Building Department.

77. On August 7, 2003, Furey writes to then Acting Village Manager as follows:

> "Mr. Tiekert's dissertation on why the drainage plan is wrong is not only technically flawed, but is entirely moot. It is not the Village professionals who have no understanding of the issues, but rather Mr. Tiekert whose amateurish attempt at evaluating the drainage plan, evinces a complete lack of understanding. First and foremost, the plan that was approved by the Planning Board was reviewed by then Village Consulting Engineer Dolph Rotfeld. It was Mr. Rotfeld's evaluation that the plan could in fact work, and the site plan approved based on that recommendation. **While the ideal situation would**

have been to tie the storm drains on Pine Street to the Village storm drain system on Walnut (requiring an easement to make the connection), it is my understanding that this was explored and was found to be not feasible since the required easement could not be obtained. Given the fact that the storm drainage therefore was required to utilize drywells, I would have to agree with Mr. Rotfeld's evaluation that this was the best possible system given the site constraints. <u>The fact of the matter is that the drainage plan was approved as designed</u>." (emphasis added)

78. As reflected in the contents of an email correspondence from Furey to Verrastro dated May 30, 2006, it was explicitly stated that the off-site improvements required of Plaintiff by the Planning Board had been met.

> "As we well know, the Village has been actively trying to resolve the technical issues related to the drainage on Pine Street since the paving of the road was completed. We have examined all the possible solutions to improve the situation, and have proceeded in a manner prudent with engineering practice in doing so. Mr. Tiekert, however has continued to focus on his own agenda, and not a true resolution of the issue. **The fact remains, that, <u>as approved by the Planning Board</u>, Pine Street was constructed using a drywell drainage system**. The fact that this system, while functional, is not optimal, is why we are revisiting the possible additional options for handling the drainage.
>
> **That being said, the applicant is obliged to construct the drainage in accordance with the approved plans, which <u>he did</u>.** Mr. Tiekert continues to assert that Mr. Pannetta made some kind of mistake in the installation of the drywell system, which is unfounded and simply not true. **The Village <u>did</u> make it clear that <u>Mr. Pannetta needed to construct the road and drainage in accordance with the Approved Plans, and he did just that</u>.** (emphasis added)

79. In 2007, Mr. Tiekert made a FOIL for

"ALL RECORDS AND DOCUMENTS ASSOCIATED WITH THE HIRING OF KEITH FUERY (sic), INCLUDING BUT NOT LIMITED TO CONTRACT, BID DATE, AND BID'S FOR POSITION OF VILLAGE CONSULTING ENGINEER."

80. In a March 27, 2007 email to Verrastro, Furey writes as follows:

> "Inasmuch as Mr. Tiekert has chosen to impugn my professional reputation in a public forum, with his reading of this letter night's Board of Trustees' Meeting, I feel equally compelled to respond to same on the record.

Therefore, this letter is being copied to all recipients annotated on Mr. Tiekert's letter of March 26, 2007. Additionally, should this issue remain unresolved by the next Board of Trustees Meeting, I would appreciate the opportunity to present the facts relative to Pine Street in the same public forum that Mr. Tiekert saw fit to present his unsubstantiated accusations in. In any event, should Mr. Tiekert continue to insist on defaming me publicly, I will be left with no other alternative but to seek whatever legal remedies are available to me, to compel him to cease and desist with his baseless accusations."

81. That correspondence continues as follows:

"As I have stated to Mr. Tiekert numerous times in the past, while it is my professional opinion that a hard piped storm water drainage system for Pine Street would have been preferable, the drywell system as designed, was approved by the Village Engineer at that time (Dolph Rotfeld), a Final Site Plan Approval granted by the Planning Board based on that design, and the current system installed in accordance with said plans. While the final solution to the Pine Street drainage issue most definitely lies in the installation of a hard piped storm water collection pipe, connected to the existing storm water system on Walnut Street, Mr. Tiekert fails to understand that since the existing system was built as per the approved site plan, **this issue cannot go back to the Planning Board for redesign and re-approval. . . Inasmuch as the procedures for Planning Board approval were in fact followed, and the roadway conforms to said plans, and the houses were constructed in accordance with the required zoning regulations and the New York State Residential Building code**, I fail to see where this [Mr. Tiekert's] assertion has any merit."

82. That the foregoing statements from the cited correspondence of Furey[9] establish the following uncontroverted facts.

(A) That Plaintiff completed the off-site improvements in accordance with the Planning Board Resolution of November 29, 2001 and the approved Plans and Specifications;

(B) As such, the matter **could not** go back to the Planning Board for redesign and re-approval; and

[9] Mr. Furey has recently passed away and the Village has allowed the performance bond to expire.

(C) The houses, i.e. 514 Pine Street and 520 Pine Street were constructed in accordance with the required zoning regulations and the New York State Residential Building Code.

Period 3 - Improper Village Intervention: The Role of Janet Insardi - Former Village Attorney/Village Manager Richard Slingerland

The Village's Threat to Revoke the TCO

83. By letter dated August 27, 2009 from Winter written directly to Plaintiff, it was threatened that unless the Plaintiff took ". . . immediate steps to resolve the drainage issue to the Village's satisfaction, I will have to revoke the temporary certificate of occupancy."

84. As reflected in the aforementioned Foiled material provided by the Village to Plaintiff, in an August 28, 2009 letter from Slingerland to Morelli, who has also individually lobbied for a withholding of the permanent certificate of occupancy for 514 Pine Street, the Village Manager thanks him ". . . for your letter of August 18, 2009,[10] asking about the issues surrounding Pine Street. . ." and therein further notes ". . . the Building Inspector has advised Mr. Panetta that he will be required to take immediate steps to resolve the drainage issues satisfactorily, otherwise the Temporary Certificate of Occupancy will be revoked."

85. In an October 29, 2009 letter from Morelli, Slingerland is reminded that Plaintiff was told that he "will be required to take immediate steps to resolve the drainage issues satisfactorily otherwise the temporary certificate of occupancy will be revoked."

86. In that correspondence Morelli further notes that it is his understanding

[10] Although this letter is referred to in the Village Manager's letter it has not been produced by the Village in a FOIL request.

". . . that the Village has had no response to the letter the Building Inspector sent to Mr. Panetta. . ." and then inquires as to ". . . when the Village will be taking the action you stated above."

87. Immediately subsequent to that correspondence by letter dated October 30, 2009 from Winter written directly to Plaintiff, referencing the prior letter of August 27, 2009, the Building Official warned "if you continue to ignore this situation I will be forced to revoke your C of O."

88. That correspondence from Winter was copied to both Insardi and Slingerland.

89. That correspondence promoted Plaintiff to seek counsel who responded with a six (6) page letter dated November 6, 2009 to Mr. Winter essentially setting forth what has been previously set forth herein, i.e. that the Village Engineer Keith Furey had on numerous occasions stated in written correspondence to multiple Village Officials that Pine Street was completed in accordance with the Planning Board's November 29, 2001 resolution and the Plans and Specifications filed with the Building Department.

90. That correspondence having gone unanswered, a subsequent letter of November 30, 2009 was sent by counsel to Winter reminding him of his statutory duties.

91. In response to the correspondence of November 6, 2009 and November 30, 2009, a letter dated December 3, 2009 from Insardi to Plaintiff's counsel wherein it is stated **". . . the project as built deviates from the project as approved by the Planning Board."** (emphasis added)

92. It is further stated in that correspondence, "I suggest that your client meet with the Building Inspector and Village Manager to resolve the drainage issues. Your

client's failure to address the issues will result in revocation of the temporary certificate of occupancy."

93. That correspondence from Insardi was copied to both Winter and Slingerland.

94. Shortly after that letter was written, Insardi was relieved of her duties as Village Attorney and was replaced in that position by Defendant Derrico.

95. On December 10, 2009, counsel for Plaintiff once again wrote to Winter reminding him of the statutory duty to issue C of O's was that of the Building Official alone.

96. A portion of that correspondence also stated:

> "I believe any objective observer would agree that if push came to shove, the Village would be in the unenviable position of having to explain how, in view of the material contained in its own files, it continues to not only withhold the issuance of the permanent certificate of occupancy but threatens to revoke the existing temporary certificate of occupancy."

97. Through a March 2, 2010 correspondence Winter continued to threaten to revoke the TCO but now contended, "It is not within my power to accept this road as completed; therefore I cannot issue a permanent Certificate of Occupancy. I would need something from the Department of Public Works or the Board of Trustees telling me the Village has accepted this road as it is."

98. Winter followed with a letter of April 5, 2010 which, in addition to making various misstatements of law, clearly confirms Plaintiff's theory that Defendants are trying to coerce Plaintiff into performing a "private public works project" by installing a hard pipe drainage system that was not required by the Planning Board

Resolution of November 29, 2001 or the Plans and Specifications submitted to the Building Department. That correspondence states:

> "I would also like to inform you that while I was doing an inspection on a property that has frontage on Pine Street and Melbourne, I mentioned to the owner of that property that a drainage pipe installed across their property might cure the problems on Pine Street. I asked the Village engineer to see if a drainage pipe could be properly installed from Pine to Melbourne. He believes it could be done. I got the impression from the owner that they might be approachable to discuss this."

99. Winter thereafter improperly, erroneously and intentionally directed Plaintiff's counsel to file an application with the Planning Board for the purpose of determining whether Plaintiff had complied with the Planning Board's Resolution of November 29, 2001 and in accordance with the Plans and Specifications filed with the Building Department.

100. At Winter's direction, a thirteen (13) page application was filed with the Building Department to be placed upon the Planning Board calendar.

101. Having heard nothing concerning the status of that application, Plaintiff's counsel contacted the Chairman of the Planning Board who expressed the position that the matter was not a proper subject for the Planning Board and would not be placed on their agenda.

102. After that conversation, Plaintiff's counsel wrote to Winter on May 24, 2010 and stated as follows:

> "Since my phone calls to you have gone unanswered, I took the liberty of calling Bob Galvin, the Chairman of the Planning Board, concerning the 'status' of Mr. Panetta's application to that body. To say that Mr. Galvin was mystified as to your suggestion that it was the Planning Board that would '. . . approve the completion of Pine Street. . .' is an understatement.
>
> I have spent the last year and a half listening to bogus excuses for the withholding of the permanent certificate of occupancy for 514 Pine Street

and being continuously directed to dead end 'administrative review'."

103. On or about May 2011, some year later after the filing of the application, Plaintiff's counsel received a call from the Secretary of the Planning Board indicating that Winter had directed that Plaintiff's aforementioned application be placed on the Planning Board agenda.

104. Plaintiff's counsel advised the Planning Board Secretary that the application should be removed from the agenda.

105. Most recently Tiekert and Morelli have appeared at regularly scheduled meetings of the Board of Trustees of the Village of Mamaroneck and stated that Plaintiff had lied to the Planning Board and contrary to the statements made by Furey, Plaintiff had not completed the project according to the Planning Board Resolution of November 29, 2001 and the Plans and Specifications filed with the Building Department.

106. The Board of Trustees under Code §6-630 has the right to remedy the road issues which were specifically affecting the Tiekert/Morelli property at 130 Beach Avenue, however, such remedial action would have placed the economic burden on the Village and/or Tiekert and Morelli.

107. §6-630(4) states:

> "4. The board of trustees, in its discretion, may provide that the cost of any one or more or all of such highway improvements shall be borne partly by the village at large and partly by the lands benefited thereby; or such board may provide that the cost of any one or more or all of such highway improvements shall be borne by the village at large; or such board may provide that the cost of any one or more or all of such highway improvement may be assessed entirely upon the lands benefited thereby."

108. That based upon the foregoing Code provision, since, as acknowledged by Furey, Plaintiff had completed all off-site required improvements in compliance with the

Planning Board Resolution of November 29, 2001 and the Plans and Specifications filed with the Building Department, Defendants continued to attempt to coerce Plaintiff to perform the aforestated private public works project as the economic burden now theirs.

109. That commencing in August of 2009 and continuing thereafter, Defendants have performed acts, individually and in concert with each other that have (a) deprived Plaintiff of the right of substantive due process; and (b) constituted a violation of Plaintiff's First Amendment Rights and that such actions are reflective of governmental action wholly without legal justification, constitute egregious conduct shocking to the conscience and were performed with "evil motive" or "callous indifference."

AS AND FOR A FIRST CAUSE OF ACTION FOR A VIOLATION OF SUBSTANTIVE DUE PROCESS UNDER 42 U.S.C. §1983

110. Repeats and reiterates the allegations contained in paragraphs 1 through 109 of this Complaint as if fully set forth herein.

111. In land use cases considering violations of substantive due process under §1983, plaintiff must show: (1) a cognizable property interest or a clear entitlement to the property interest; and (2) that defendants infringed on that property right in an arbitrary and irrational manner, i.e. that the defendants actions were wholly without legal justification so that they constitute a gross abuse of governmental authority.

112. §1983 is not itself a source of substantive rights, but a method for indicating federal rights elsewhere conferred by those parts of the United States Constitution and federal statutes that it describes.

113. Since the United States Constitution generally does not create property interests, in determining the issue of "clear entitlement", courts must look to existing rules or understandings that stem from an independent source to determine whether a claimed property right rises to the level of a right entitled to protection under the substantive due process doctrine.

114. This independent source is state law, here, New York State Law.

115. Under federal precedents, an applicant has a clear entitlement to a land use benefit where, absent the alleged denial of due process, there is either a certainty or a very strong likelihood that the application would have been granted.

116. Thus, a "legitimate claim of entitlement" exists where, under applicable state law, absent alleged denial of due process, there is either a certainty or a very strong likelihood that the application would have been granted.

117. There are two distinct positions presented in this regard.

(A) Since the Premises complies with the applicable State and municipal law, then under the applicable law there was no element of discretion or judgment remaining for the Building Official to exercise in determining whether to issue the C of O and thus Plaintiff had every reason to rely on the representation implicit in issuing the building permits that certificates of occupancy would be granted if the building(s) were constructed in accordance with the plans upon which the building official permits were issued.

118. Therefore Plaintiff had more than a unilateral expectation that the C of O would be issued and thus a cognizable property right.

119. In drawing on the principles concerning a cognizable property right as set forth by federal precedents, it has been stated in cases interpreting the issue, that the expectation of the issuance of a certificate of occupancy can constitute a cognizable property right.[11]

120. Applicable State and municipal regulations which clearly demonstrate that the Building Official had no discretion but to issue the certificates of State and Village Building Codes with respect to the issuance of certificates of occupancy.

(A) Where an authorized municipal agency, here the Planning Board, pursuant to Village Law 7-736(2) directs that a property owner post a bond in lieu of a promise to complete off-site improvements, the Building Official may not withhold issuance of a certificate of occupancy for a premise which otherwise meets all State and municipal building codes and any other regulations relating to structural, fire and other safety requirements.

121. It is Plaintiff's position that in the application of the pertinent statutes it is the obligation of the Building Official to issue the C of O for the Premises as he is without discretion to deny same.

122. It is further alleged that the withholding of the issuance of the C of O was reflective of governmental action wholly without legal justification and constituted

[11] See Acorn Ponds at North Hills v. The Incorporated Village of North Hills, 623 F.Supp 688, 692 (E.D.N.Y. 1985); See also Sullivan v. Town of Salem, 805 F.2d 81 (2nd Cir. 1985) citing Acorn Ponds, *supra*.

egregious conduct shocking to the conscience on the part of the respective municipal officials.

123. That because of the foregoing, Plaintiff has been damaged in an amount in excess of Five Hundred Thousand ($500,000) Dollars.

AS AND FOR A SECOND CAUSE OF ACTION AGAINST DEFENDANTS TIEKERT AND MORELLI FOR CONSPIRACY UNDER §1983

124. Repeats and reiterates the allegations contained in paragraphs 1 through 123 of this Complaint as if fully set forth herein.

125. Private individuals who are not state actors may nonetheless be liable under §1983 if they have conspired with or engaged in joint activity with municipal officials.

126. In order to establish a conspiracy claim under §1983 a plaintiff must allege (1) an agreement between two or more state actors, or a state actor and a private party; (2) to act in concert to inflict an unconstitutional injury; and (3) an overt act done in furtherance of that goal causing damages.

127. It is alleged that Defendants Tiekert and Morelli, acting in concert with officials of the Village, attempted to cause Plaintiff to perform a "private works project" by coercing him to install a hard pipe drainage system which was not required by the Resolution of November 29, 2001 of the Planning Board.

128. Defendants Tiekert and Morelli performed the overt act having directly petitioned officials of the Village and enlisted their aid in attempting to coerce Plaintiff into installing a hard pipe drainage system which was not required by the Planning Board Resolution of November 29, 2001.

129. That in furtherance of this conspiracy, Village officials directed and/or acquiesced in the wrongful withholding of the C of O for the Premises and threatening to revoke the TCO.

130. That as a result of said actions, Plaintiff has been damaged in an amount in excess of Five Hundred Thousand ($500,000) Dollars.

AS AND FOR A THIRD CAUSE OF ACTION - A VIOLATION OF PLAINTIFFS FIRST AMENDMENT RIGHTS

131. Repeats and reiterates the allegations contained in paragraphs 1 through 130 of this Complaint as if fully set forth herein.

132. The right to complain to public officials and to seek administrative and judicial review are protected by the First Amendment.

133. Once Village Engineer Furey determined that the work completed by Plaintiff relative to the conditions set forth in Planning Board Resolution and the building permit issued in consequence thereof, Plaintiff continually petitioned the Building Official and other municipal officials for the issuance of the C of O.

134. That because of Plaintiff's exercise of these rights, the continued failure of the municipal Defendant to issue the C of O was in retaliation of Plaintiff's exercise of their First Amendment rights.

135. That the Defendants undertook a purposefully aggravated and persistent course of conspiratorial non compliance and non enforcement of the pertinent municipal regulations in response to Plaintiff's attempts to secure the C of O resulting in a long

series of purposeful, retaliatory and conspiratorial actions in violation of Plaintiff's constitutional civil rights.

136. That Defendants continually and intentionally refused Plaintiff's appropriate requests to enforce the statutory regulations regarding the issuance of the C of O.

137. That the right to petition the appropriate municipal officials for the issuance of the C of O was conduct protected by First Amendment and that the exercise of these rights resulted in a pattern of egregious treatment by Defendants, in particular Winter, Slingerland and Insardi.

138. That based upon the foregoing violations, Plaintiff is entitled to damages in excess of Five Hundred Thousand ($500,000) Dollars.

AS AND FOR A FOURTH CAUSE OF ACTION AGAINST THE INDIVIDUALLY NAMED DEFENDANTS UNDER 42 U.S.C. §1983

139. Repeats and reiterates the allegations contained in paragraphs 1 through 138 of this Complaint as if fully set forth herein.

140. A claim under §1983 may be made against municipal officials individually and/or private individuals who have conspired with them where their actions have resulted in a deprivation of Plaintiff's constitutional rights as a result of malice and/or callous indifference.

141. Where such a finding is made, an imposition of punitive damages is appropriate.[12]

142. In §1983 cases, in determining whether punitive damages are appropriate, the consideration is whether there is an "evil motive" or "callous indifference" on the part of the municipal officers participating of the complained of decision, here the improper determination not to issue the C of O.

143. Once the protected sphere of privilege is exceeded, municipal officials are individually liable for their reckless conduct.

144. In the case at bar, the individually named Defendants and/or the private individuals who have conspired with them evidenced an "evil motive" or have acted with callous indifference towards the constitutional rights of Plaintiff.

145. The above cited improper activities engaged in by Defendants were done either with evil motive or intent and/or with callous indifference to Plaintiff's constitutional rights and thus punitive damages should be imposed.

146. Based upon the foregoing violation of §1983, Plaintiff is entitled to punitive damages in excess of Five Hundred Thousand Dollars ($500,000).

AS AND FOR A FIFTH CAUSE OF ACTION FOR AN AWARD OF ATTORNEY'S FEES UNDER 42 U.S.C. §1988

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[12] SEE: City of Newport v. Facts Concerts, 453, U.S. 247 (1981).

In that case in addition to finding a violation of §1983 against the municipality and awarding compensatory damages, the individual members of the council were each assessed punitive damages in the amount of $75,000.

In sustaining the award of punitive damages personally against the mayor and the individual council members, the court noted that ". . . punitive damages might be awarded in appropriate circumstances in order to punish violations of constitutional rights." *Id.* @ 268. The Court stated that ". . . the deterrence of future abuses of power by persons acting under color of state is an important purpose of § 1983 . . ." *Id.* @ 268.

147. Repeats and reiterates the allegations contained in paragraphs 1 through 146 of this Complaint as if fully set forth herein.

148. As a result of Defendants' conduct in violation of § 1983, Plaintiff is entitled to an award of attorney's fees pursuant to 42 U.S.C. §1988 based on the reasonable value of legal services rendered and payable by Defendants.

149. Under §1983, attorney's fees are to be awarded for prosecution of that claim, and in addition thereto, for the resolution of the state declaratory judgment issues which related to the basis of the successful prosecution of the 1983 claim. O'Mara v. Town of Wappinger, 400 F.Supp.2d 634 (S.D.N.Y. 2005).

150. That the reasonable amount of these fees is in excess of Two Hundred and Fifty Thousand ($250,000) Dollars.

AS AND FOR A SIXTH CAUSE OF ACTION FOR PRIMA FACIE TORT UNDER NEW YORK STATE LAW

151. Repeats and reiterates the allegations contained in paragraphs 31 through 109 of this Complaint as if fully set forth herein.

152. Under New York Law, a prima facie tort occurs when there is the intentional harm resulting in damage, without excuse or justification by an act or a series of acts which would otherwise be lawful.

153. It has been held in New York State that where the defendant has intentionally failed and refused to issue certificates of occupancy despite ordinances mandating such issuance such action sounds in prima facie tort. Tender Trap, Inc. v. Town of Huntington, 100 Misc.2d 108 (N.Y. Supreme 1979).

154. The facts in the instant matter demonstrate a concerted course of conduct by municipal officials of the Village to deny issuance of the certificate of occupancy for

the Premises in an attempt to coerce Plaintiff into performing additional work which was not part of Planning Board Resolution nor part of the original requirements of the building permit.[13]

155. By virtue of the Village is continual and improper refusal to issue the permanent C of O for the Premises, Plaintiff was deprived of the opportunity to sell the Premises when the real estate market was active.

156. Likewise, Plaintiff has been damaged in that Plaintiff has been required to retain the services of counsel in attempts to obtain the C of O.

157. Further, since the gravemen of the prima facie tort is malice, which includes reckless disregard of the rights of others which is inconsistent with good faith. Plaintiff's retention of counsel was proximate to the aforesaid malice and the conduct of Village officials was entirely motivated by disinterested malevolence.

158. That by virtue of the foregoing, Plaintiff has been damaged in an amount in excess of Five Hundred Thousand ($500,000) Dollars.

AS AND FOR AN SEVENTH CAUSE OF ACTION FOR DECLARATORY JUDGMENT

159. Repeats and reiterates the allegations contained in paragraphs 1 through 158 of this Complaint as if fully set forth herein.

The Building Official

160. The authority to act on the part of municipalities and their officials is created by statute.

[13] A certificate of occupancy may not be denied where there is an attempt by the municipality to impose conditions not included in the original building permit. SEE 3 New York Zoning Law and Practice §36:06; Lopes v. Fire Board of Appeals of the Town of Clarkstown, 90 Misc.2d 250 (Rockland Supreme 1977).

161. Inclusive in this concept is that such enabling legislation defines the respective powers, duties and responsibilities of the municipal actors.

162. Pursuant to the provisions of Village Law, a village may appoint a building official who ". . .shall have charge of the enforcement of such codes, ordinances, rules and regulations of the village.

Issuance of the Certificate of Occupancy

163. §126-20 of the Code governs the issuance of certificates of occupancy in the Village and in pertinent part states:

"§126-20. Issuance of certificate of occupancy.

A. When, after final inspection, it is found that the proposed work has been completed in accordance with the applicable building and zoning laws, ordinances and regulations and also in accordance with the application, plans and specifications filed in connection with the issuance of the building permit, the Director of Building, Code Enforcement and Land Use Administration shall issue a certificate of occupancy upon the form provided by him. If it is found that the proposed work has not been properly completed, the Director of Building, Code Enforcement and Land Use Administration shall refuse to issue a certificate of occupancy and shall order the work completed in conformity with the building permit and in conformity with the applicable building regulations." (my emphasis)

164. Wherefore Plaintiff requests a declaration that pursuant to the applicable statues it is the sole responsibility of the Village Building Official to issue certificates of occupancy.

AS AND FOR AN EIGHTH CAUSE OF ACTION FOR DECLARATORY JUDGMENT

165. Repeats and reiterates the allegations contained in paragraphs 1 through 164 of this Complaint as if fully set forth herein.

166. As stated by Furey in his aforementioned correspondence of March 27, 2007, paragraph 80 hereof:

> ". . . the houses were constructed in accordance with the required zoning regulations and the New York State Residential Building code. . ."

167. Where the construction for which the certificates of occupancy are sought, satisfies all the requirements of State and municipal law requirements, there was no element of discretion or judgment remaining for the building official to exercise in determining whether to issue the certificates and thus Plaintiff's are entitled to C of O and thus a cognizable property being established.

168. Wherefore Plaintiff requests a declaration that based upon the respective State statutes and provisions of the Code, where plaintiff has, as here, satisfied all requirements of State and municipal building codes in the construction of the premises, a certificate of occupancy must be issued.

AS AND FOR THE NINTH CAUSE
OF ACTION FOR DECLARATORY JUDGMENT

169. Repeats and reiterates the allegations contained in paragraphs 1 through 168 of this Complaint as if fully set forth herein.

170. As stated by Furey in his aforementioned correspondence set forth in paragraphs 77, 78 and 81 hereof, Plaintiff completed all off-site improvements in accordance with the Planning Board Resolution of November 29, 2001 and the Plans and Specifications filed with the Building Department.

171. Wherefore Plaintiff requests a declaration that all off-site improvements required of Plaintiff by the Planning Board Resolution of November 29, 2001 have been completed in accordance therewith and Plaintiff is entitled to the issuance of the C of O.

AS AND FOR THE TENTH CAUSE OF ACTION FOR DECLARATORY JUDGMENT

172. Repeats and reiterates the allegations contained in paragraphs 1 through 171 of this Complaint as if fully set forth herein.

173. A municipal agency, in the case at bar the Planning Board, may be granted statutory authority to impose the alternative requirement of a performance bond to assure that required improvements are completed.[14]

174. All three of these treatises are in agreement with the principle that where a statute grants the municipality the option to either have the builder complete off-site improvements or alternatively post a performance bond, it cannot later insist on both.[15] In support of this proposition the authors all cite Incorporated Village of Northport v. Guardian Federal Savings & Loan Association, 87 Misc.2d 344 (Supreme Suffolk 1976), aff'd 54 A.D.2d 893 (2nd Dept. 1976).

The Issuance of a Building Permit Under §7-736(2)
The Effect of Posting a Bond

175. On the subject, Village Law §7-736(2) states as follows:

> "No permit for the erection of any building shall be issued unless a street or highway giving access to such proposed structure has been duly placed on the official map or plan****Before such permit shall be issued such street or highway shall have been suitably improved to the satisfaction of the planning board in accordance with standards and specifications approved by the appropriate village officers as adequate in respect to the public health, safety and general welfare of the special circumstances of the particular street or highway, or alternatively, and in the discretion of such board, a performance bond sufficient to cover the full cost of such improvement as estimated by such board or other appropriate village

[14] SEE: Rathkopf's Law of Zoning and Planning §91:16; American Law of Zoning §31:49; New York Zoning Law and Practice §19:40.

[15] These treatises deal with provisions of the New York State Village Law. As will be shortly explained, the Code of the Village of Mamaroneck contains similar language but additionally makes specific reference to issuance of certificates of occupancy.

departments designated by such board shall be furnished to the village by the owner." (emphasis added)

176. As is reflected in the minutes of the Planning Board meeting of November 29, 2001, subsection E thereof, in compliance with the discretionary provisions of Village Law §7-736(2), in pertinent part thereto, the Planning Board required the following:

> "E. That prior to the commencement of any work on Pine Street a Bond shall be filed with the Clerk Treasurer of the Village of Mamaroneck in an amount to be fixed by the Village's Consulting Engineer to cover the full cost of all improvements on Pine Street and any remedial work on the tree at issue resulting from applicant's activities and such Bond shall be held for a period of one year subsequent to the completion of all work to insure the quality of the work and to remedy any deficiencies in the work which may occur during that one year period."

177. In compliance with this provision and in furtherance of the purpose stated therein, Plaintiff posted such performance bond.

178. Where as authorized municipal agency, here the Planning Board, directs that a property owner post a performance bond to cover the cost of off-site improvements, the municipality may not thereafter insist that the property owner complete the improvements.

179. Where an authorized municipal agency, here the Planning Board, directs that a proper owner post a bond in lieu of a promise to complete off-site improvements, a municipality may not withhold issuance of a certificate of occupancy for a premises which otherwise meets all State and municipal building codes and any other regulations relating to structural, fire and other safety requirements.

The Code of the Village of Mamaroneck

180. In relation to the issuance of a certificate of occupancy where a permit has been issued, §342-85 of the Code states that "no certificate of occupancy shall be issued

until all improvements shown on the approved site plan have been completed or a sufficient performance guarantee has been posted for improvements not yet complete. The sufficiency of such guarantee shall be determined by the Code Enforcement Officer or, upon such Officer's request, by resolution of the Planning Board."[16]

181. Wherefore, since Plaintiff has posted a performance bond in compliance with the directive of the Planning Board Resolution of November 29, 2001, and the Premises complies with all State and municipal building codes and any other regulations relating to structural, fire and other safety requirements, Plaintiff is entitled to the issuance of the subject C of O for the Premises.

WHEREFORE, Plaintiff demands Judgment as follows:

FIRST: On the First Cause of Action, based upon a violation of substantive due process against Plaintiff, an award of damages in excess of Five Hundred Thousand ($500,000) Dollars;

SECOND: On the Second Cause of Action, that Defendants Tiekert and Morelli have conspired with officials of the Village to deprive Plaintiff of their constitutional rights in violation of 42 U.S.C. §1983 against Plaintiff, an award of damages in excess of Five Hundred Thousand ($500,000) Dollars each;

THIRD: On the Third Cause of Action, for a violation of Plaintiff' First Amendment Rights, an award of damages in excess of Five Hundred Thousand ($500,000) Dollars;

[16] As it is argued elsewhere herein, it is uncontraverted that the Village Engineer Keith Furey has, on a number of occasions, stated in writing that the work completed by Petitioner was in conformity with the plans, specifications and requirements approved by the Planning Board in its Resolution of November 29, 2001 as to render Pine Street "suitably improved."

FOURTH: On the Fourth Cause of Action, that the individually named Defendants are liable for punitive damages to Plaintiff in an amount in excess of Five Hundred Thousand ($500,000) Dollars each:

FIFTH: On the Fifth Cause of Action, that Plaintiff is entitled to an award of attorneys fees under 42 U.S.C. §1988 in an amount in excess of Two Hundred Fifty Thousand ($250,000) Dollars.

SIXTH: On the Sixth Cause of Action, the actions of the Defendants constitute a prima facie tort against Plaintiff in which Plaintiff has been damaged in an amount in excess of Five Hundred Thousand ($500,000) Dollars;

SEVENTH: On the Seventh Cause of Action, a declaration that pursuant to the provisions of the Mamaroneck Village Code it is the sole responsibility of the Building Official to issue certificates of occupancy.

EIGHTH: On the Eighth Cause of Action, a declaration that based upon the respective State statutes and provisions of the Code, where plaintiff has, as here, satisfied all requirements of State and municipal building codes in the construction of the premises, a certificate of occupancy must be issued.

NINTH: On the Ninth Cause of Action, a declaration that all off-site improvements required of Plaintiff by the Planning Board Resolution of November 29, 2001 have been completed in accordance therewith and Plaintiff is entitled to the issuance of the C of O.

TENTH: On the Tenth Cause of Action, a declaration that once the Planning Board required the posting of a performance bond by Plaintiff in its resolution of November 29, 2001, Defendant Village could not withhold issuance of the subject certificate of occupancy.

Together with such other and further relief as this Court may deem appropriate.

Dated: July 26, 2011
Mamaroneck, NY

THE LAW OFFICE OF JOSEPH C. MESSINA

BY: _____

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